Tan Siew Peng v OCBC Bank (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-03-46 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND ABU MANSOR JJCA
17 NOVEMBER 1997

Civil Procedure *— Appeal — Record of appeal — Filing of — Extension of time to file, application for — Whether court would grant leave — Discretion of court — Whether there was sufficient material placed before court warranting exercise of discretion*

The appellant made an application seeking leave of the court to file record of appeal — which expired on 2 September 1997 — out of time and an application asking for a stay of execution pending appeal. The appellant's affidavit filed in support of the application for leave states, inter alia, that the appellant only received notification from the court registry on 6 September 1997 informing the appellant that the notice of appeal had been received and that the appellant had not received a sealed copy of the order appealed against for inclusion in the record of appeal. The respondent objected to the application seeking an extension of time, contending that the affidavit did not set any, or any sufficient, material upon which the court could exercise its discretion in the appellant's favour.

Held, dismissing the applications:

The court has power, exercisable at its discretion, to extend the time limited for the filing or service of any document or the doing of any act under the Rules of the Court of Appeal 1994 ('the Rules'). It is trite that the burden is upon an applicant who seeks an extension of time to make available sufficient material upon which the court may exercise discretion in his favour.

In the present case, there was insufficient material placed before the court warranting the exercise of discretion in the appellant's favour. The reasons advanced by the appellant in his affidavit were wholly inadequate. The fact that the appellant learned on 6 September 1997 that the notice of appeal had been received was of no relevance because it did not in any way deter the appellant from doing what was procedurally required of him. The Rules and the relevant practice direction clearly set out the steps an appellant should take to get his appeal off the ground and the time frame within which he should act. The fact that the sealed order had not become available was also irrelevant. The appellant may file the appeal record without the sealed order and later include it in a supplementary record. What is of importance is that the appellant should include the notes of proceedings and the grounds of judgment in the record of appeal. These documents had been received some two weeks before the date on which the court heard the motion. In the circumstances of the case, the appellant had sufficient time to file and serve the appeal

record before his application came on for hearing. Accordingly, the application for extension of time was devoid of any merit and was dismissed. Consequently, the appellant's application for a stay pending appeal became redundant and was dismissed (see pp 423C–I and 424A–B).

[Bahasa Malaysia summary

Perayu membuat satu permohonan meminta kebenaran mahkamah untuk memfailkan rekod rayuan — yang luput pada 2 September 1997 — di luar masa dan satu permohonan meminta penggantungan pelaksanaan sementara menunggu penyelesaian rayuan. Afidavit perayu yang difailkan bagi menyokong permohonan untuk kebenaran menyatakan, antara lain, bahawa perayu hanya menerima pemberitahuan dari pejabat pendaftar mahkamah pada 6 September 1997 yang memaklumkan bahawa notis rayuan telah diterima dan bahawa perayu tidak menerima sesalinan bermeterai perintah yang dirayu untuk kemasukan dalam rekod rayuan. Penentang membantah terhadap permohonan meminta perlanjutan masa, dengan menghujahkan bahawa afidavit tidak menetapkan sebarang material atau sebarang material yang mencukupi supaya mahkamah boleh melaksanakan budi bicara memihak kepada perayu.

Diputuskan, menolak permohonan-permohonan:

Mahkamah mempunyai kuasa, yang boleh dilaksanakan pada budi bicaranya, untuk melanjutkan masa yang dihadkan untuk pemfailan atau penyampaian mana-mana dokumen atau kelakuan mana-mana perbuatan di bawah Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah tersebut'). Adalah mantap bahawa beban terletak pada pemohon yang meminta perlanjutan masa untuk menyediakan material agar mahkamah dapat melaksanakan budi bicara memihak kepadanya.

Dalam kes ini, tidak terdapat material yang mencukupi yang diletakkan di hadapan mahkamah bagi mewajarkan pelaksanaan budi bicara memihak kepada perayu. Alasan-alasan yang dikemukakan oleh perayu dalam afidavitnya tidak memadai pada keseluruhannya. Hakikat bahawa perayu mendapat tahu pada 6 September 1997 bahawa notis rayuan telah diterima tidak relevan kerana ia tidak mencegah perayu dalam apa-apa cara daripada melakukan apa yang dikehendaki dari segi prosedur daripadanya. Kaedah tersebut dan arahan amalan yang relevan dengan jelasnya menyatakan langkah-langkah yang harus diambil oleh perayu untuk memulakan rayuannya dan jangkamasa dalam mana dia harus bertindak. Hakikat bahawa perintah bermeterai tidak disediakan juga tidak relevan. Perayu boleh memfailkan rekod rayuan tanpa perintah bermeterai dan kemudiannya memasukkannya dalam rekod tambahan. Apa yang penting adalah bahawa perayu harus termasuk nota-nota prosiding dan alasan penghakiman dalam rekod rayuan. Dokumen-dokumen ini telah

diterima kira-kira dua minggu sebelum tarikh pada mana mahkamah mendengar usul. Dalam keadaan kes, perayu mempunyai masa yang mencukupi bagi memfailkan dan menyampaikan rekod rayuan sebelum permohonannya didengar. Dengan itu, permohonan untuk perlanjutan masa adalah tanpa sebarang merit dan ditolak. Akibatnya, permohonan perayu untuk penggantungan sementara menunggu penyelesaian rayuan menjadi tidak diperlukan dan ditolak (lihat ms 423C–I dan 424A–B).]

Notes

For cases on record of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 624–636.

Legislation referred to

Rules of the Court of Appeal 1994

Appeal from: Bankruptcy Case No 29–793 of 1994

Suhairi Sukur (*RJ Esa & Co*) for the appellant.
K Mohan (*TM Eng* with him) (*Shook Lin & Bok*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering judgment of the court): Two applications came before us. Both were by the appellant. Both were opposed by the respondent.

By the first the appellant sought leave of this court to file the record of appeal out of time. The second application asked for a stay of execution, pending appeal, of the order made by the High Court. We heard the application for extension of time first because upon its result depended the survival of the application for stay of execution.

In opposing the motion seeking an extension of time, counsel for the respondent submitted that the appellant's affidavit filed in support of the application did not set any, or any sufficient, material upon which this court could exercise its discretion in the appellant's favour.

A perusal of the appellant's affidavit reveals that the only points made in it are these:

(1) On 12 July 1997, the judge sitting in chambers dismissed an appeal from the registrar in the matter of the appellant's bankruptcy.

(2) On 23 July 1997, the appellant lodged notice of appeal to this court against the decision of the judge in chambers.

(3) The time limited for filing the record of appeal by the appellant expired on 2 September 1997.

(4) The appellant was unable to file the record of appeal because:

A (a) The appellant's solicitors only received notification from the registry of this court on 6 September 1997 informing them that the notice of appeal which had been filed on 23 July 1997 had been received on 31 July 1997; and

(b) The appellant's solicitors had not received a sealed copy of the B order appealed against for inclusion in the record of appeal.

After hearing argument, we came to the conclusion that the respondent's objection was well founded.

There is no doubt that this court has power, exercisable at its discretion, to extend the time limited for the filing or service of any document or the C doing of any act under the Rules of the Court of Appeal 1994 ('the Rules'). And it is trite that the burden is upon an applicant who seeks an extension of time to make available sufficient material upon which this court may exercise discretion in his favour.

In the present case, we found ourselves in agreement with counsel for D the respondent that there was insufficient material placed before us warranting the exercise of discretion in the appellant's favour. The reasons advanced by the appellant in his affidavit are wholly inadequate. Indeed, counsel for the appellant frankly conceded the point.

The fact that the appellant's solicitors learned on 6 September 1997 E that their client's notice of appeal had been received on 31 July 1997 is of no relevance because it did not in any way deter the appellant from doing what was procedurally required of him. After all, the Rules as well as the relevant practice direction clearly set out the steps an appellant should take to get his appeal off the ground and the time frame within which he should act.

F Equally irrelevant is the fact that the sealed order had not become available. It was always open for the appellant to file the appeal record without the sealed order and later include it in a supplementary record. Such a practice is commonplace in this court. What is of importance is that an appellant should include the notes of proceedings and the grounds of G judgment in the record of appeal. Where these are not made available within the time limited for filing the appeal record, an appellant may, in accordance with the relevant practice direction, obtain an extension of time from the registrar without having to formally move this court. However, if for any reason the appellant fails to act under the practice direction, he may nevertheless apply to this court and obtain an extension of time H pending his receipt from the High Court of the notes of proceedings and the grounds of judgment of the judge. In the present instance, there is nothing to show when the appellant had applied to the learned judge of the High Court for the notes of proceedings and the grounds of judgment, although we were advised from the Bar by counsel for the appellant that I these documents had been received some two weeks before the date on which we heard the motion. In the circumstances of the case, the appellant had sufficient time to file and serve the appeal record before his application came on for hearing.

Accordingly, the application for extension of time was devoid of any merit. We therefore refused it and ordered the appellant to bear the costs of the application.

The motion to extend time having been dismissed, the appellant's application for a stay pending appeal became redundant. It was therefore dismissed.

Once the appellant's application for extension of time had been refused, it followed that there was no competent appeal before us. For completeness we therefore dismissed the appeal. Since counsel for the respondent did not ask for costs either upon the motion for stay or upon the appeal, we made no order as to costs in respect of these.

Applications dismissed.

Reported by Jafisah Jaafar